Office of Chief Counsel Internal Revenue Service

memorandum

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MIRoot

date: August 30, 2000

to: Chief, Quality Measurement Staff, Upstate New York District

Attn: Richard W. Checci

from: Acting District Counsel, Buffalo

subject:

Foreign Sales Corporation
Interest netting pursuant to I.R.C. § 6621(d)

DISCLOSURE STATEMENT

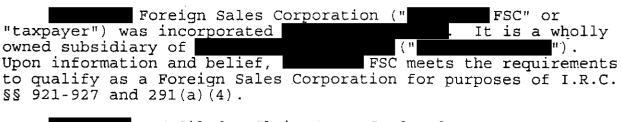
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This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

DISCUSSION

This is in response to your request for our opinion concerning the above-captioned taxpayer. Generally, the issue involved is whether interest netting per I.R.C. § 6621(d) can apply between two different taxpayers.

<u>Facts</u>



FSC filed a Claim For Refund And Request For Abatement (Form 843) seeking the abatement of interest in the amount of \$ ______. The taxpayer claims it is entitled to interest netting between itself and _______.

The taxpayer's Form 843 states that the relevant period is to the present. However, the attachment to the Form 843 provides that the relevant period is the taxpayer's taxable year ending (" ").

According to FSC, it estimated its tax liability to be \$ That amount was paid through estimated tax payments.

According to FSC, its additional tax liability of resulted from higher foreign sales corporation ("FSC") commission income than had originally been included by it and deducted by for Therefore, according to the taxpayer, overpaid its tax liability in an amount equal to FSC underpayments.

The taxpayer reasons that since there have been equivalent underpayments and overpayments for the same period by FSC and , it is entitled to the benefits of I.R.C. § 6621(d).

The taxpayer asserts that it exercised "ordinary business care and prudence." Therefore, the underpayment of tax resulting in increased interest due to the Internal Revenue Service, at issue in this case, was not due to willful neglect.

The taxpayer admits that FSC and remains are not the "same taxpayer". However, it argues they are "essentially the same taxpayer". That in substance, but not form a parent corporation and its FSC are the same taxpayer, because under the FSC rules, a parent can act on behalf of its FSC in many circumstances. Therefore, the parent and its FSC are essentially the same taxpayer and should be able to claim the benefits of the interest netting provisions.

<u>Issue</u>

Whether a corporation and its wholly owned subsidiary, which is a Foreign Sales Corporation (FSC), are entitled to the benefits of 'interest netting" under I.R.C. § 6621(d)?

<u>Analysis</u>

Under I.R.C. § 6402(a), the Service can credit an overpayment as long as the person who made the overpayment is also liable for a tax against which the overpayment is to be credited. Generally, a member of a consolidated group is severally liable for the income tax liability of the group. Treas. Reg. § 1.1502-6(a). When a tax is jointly and severally owed by two or more taxpayers, the Service has the authority to collect the full amount of the unpaid tax from any of the liable taxpayers. Further, any interest attributable to the underpayment of the consolidated return tax liability will be computed subject to the provisions of I.R.C. § 6601(f).

I.R.C. § 6621(d) provides that to the extent interest is payable for any period under subchapter A and allowable under subchapter B on equivalent under payments and overpayments by the same taxpayer of tax imposed by the Code, the net rate of interest under Section 6621 on such amount shall be zero for such period.

Pursuant to I.R.C. § 1501, "an affiliated group of corporations shall, subject to the provisions of this chapter, have the privilege of making a consolidated return with respect to the income tax imposed by chapter 1 for the taxable year in lieu of separate returns..." I.R.C. § 1504(a) defines "affiliated group" as one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation..." I.R.C. § 1504(b) defines "includible corporation" as any corporation except a foreign corporation. I.R.C. § 1504(b)(3).

Since FSC, is by statute, not a member of an "affiliated group", it is not a member of a consolidated group

for purposes of I.R.C. § 6402(a). As a result, the Service may not credit the overpayment of to the liabilities of FSC. Additionally, since these corporations are not the "same taxpayer", interest netting would not apply regardless of whether the under payments or overpayments were currently outstanding.

Given the lack of regulations, case law and Treasury Rulings on this issue, we are forwarding a copy of this opinion to our National Office for post-review. If, as a result of that post-review, there are any changes to our conclusions, we will apprize you of those changes.

If you have any questions regarding this matter, please contact Matthew I. Root of our office at 551-5610.

EDWARD D. FICKESS
Acting District Counsel